In the Supreme Court

OF THE

United States

Supreme Court, U.S.
FILED
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OCTOBER TERM, 1943

323 U.S. # 12

No. 155

DEN-DOM

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT OF PETITION.

14345

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THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

This is an application under Section 240 of the Judicial Code (28 USCA 347) for a review, on certiorari, of the following matter, viz:

Case No. 10,329 (CCA 9th Cir.) entitled "Ernest H. Denicke and Mary E. Doble, Appellants v. The Anglo California National Bank of San Francisco, et al., Appellees."

SUMMARY STATEMENT OF THE MATTER INVOLVED.

We come to this Court with a record disclosing serious misconduct in the Circuit Court of Appeals for the Ninth Circuit. There has been a miscarriage of justice. Certiorari is necessary to correct that condition.

Nature of the Litigation.

Petitioners are prosecuting a derivative suit on behalf of The Anglo California National Bank of San Francisco. Respondents are present and former directors charged with violations of Federal Banking Laws. The damages arise from breach of trust. The loss exceeds four million dollars.

The District Court approved a settlement without making the inquiry required by Rule 23(c) FRCP. The bank engineered this proposal. It accepted five percent of the liability, thus obtaining a release for twenty-two of its directors.

Petitioners objected. They were denied a hearing. There were no findings. Judgment was entered without a trial. A motion to vacate was denied.

Gross Irregularities in the Circuit Court.

The Circuit Court refused to decide the questions presented. An irregular opinion was filed during adjournment. *This document was void, and in violation of Court rules because of the lack of a concurring signature.* We present same as,—

Petitioners' Exhibit No. 1.
Signature Clause Attached to "Opinion".

"*We* need not stop to inquire whether the order denying appellants' motion to vacate the judgment was appealable, for the opinion already sufficiently indicates *our view* that appellants had ample time and a reasonable opportunity to present a full showing in opposition to the compromise. *We* find no merit in other points argued.

"Affirmed.

_____

_____

William Healy,

United States Circuit *Judges.*"

This document was prepared for the signatures of *three* "United States Circuit Judges". It was signed by *one Circuit Judge.*[1]

It was the act of Circuit Judge Healy. It was not the act of the Circuit Court of Appeals for the Ninth Circuit.

In that Circuit, the power of an individual judge is strictly limited during adjournment. He has no authority to *announce* a decision. He may join with one or more of his associates and *render* a decision by filing *signed opinions* or other *documents of decision* with the clerk. There is no other procedure.[2] Litigants are entitled to *documentary evidence,* supported by the *signatures* of at least *two Circuit Judges.*

This practice was established by an amendment of the rules effective November 30, 1936. That amendment was evidenced by a document signed by every member of the Court. We present same as our next exhibit.

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[1]Clerk of CCA refused to print a true copy of the opinion. In spite of our designation (R. 2070, item 8) the irregular signature clause was left out. (R. 1996 at 2004.) The transcript is false in not showing the matter quoted on preceding page. We file, herewith, motion to correct diminution of record.

[2]Authority to adopt such rule granted by the Act providing for organization of the Circuit Courts of Appeal. See:

> Act of Mar. 3, 1891, 26 Stat. 826, Chap. 517, Sec. 2. "The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

Petitioners' Exhibit No. 2.

"UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE AMENDMENT
OF RULE III OF THE RULES OF
PRACTICE OF THIS COURT.

IT IS HEREBY ORDERED that Rule III of the Rules of Practice of this Court be amended by the addition of a paragraph number (4) to said rule, as follows:

(4) No adjournment in any of the terms of the Court shall be made to the succeeding term save when made on the last day prior to the beginning of such succeeding term. *Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the Clerk.*

Dated: Nov. 30, 1936.

(Signed) Curtis D. Wilbur

Francis A. Garrecht

(Endorsed) William Denman

Filed Nov. 30, 1936 Clifton Mathews

Paul P. O'Brien, Clerk Bert Emory Haney

United States Circuit Judges."[3]

[3]Clerk of CCA disregarded our designation of this document (R. 2074, Item 8a.) We include it in our motion filed herewith to correct the record.

The Court had a membership of five when this document was filed.

Clerk's Entries During Adjournment.

The "opinion" was filed March 1, 1944. On the same day, the Clerk made an "Order" and entered a "Decree". *Both were unsigned.* The Court was not in session. *It did not make any order. It did not direct the entry of any decree.*[4]

Refusal to Vacate the "Decree".

We moved to set aside these proceedings. (R. 2005.) Circuit Judge Mathews presided. He was accompanied by Judge Healy—author of the opinion. The third member was absent.[4a] *These two sat to pass upon their conduct in our case.* Argument on the motion was cut short. Judge Mathews made the following statement from the Bench:

> "Rule 3, paragraph 5, is a rule made by this court for the guidance and protection of its clerk. Neither you nor your clients have any interest in enforcing that rule. *It isn't any of your business whether that is complied with, or not.*" (R. 2058.)

Application for Reassignment in Bank.

We sought an immediate reassignment to the Court in bank. By praecipe, the clerk was requested to present such

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[4]The clerk was involved in four distinct violations of duty on this date.

1. Entry of "Order Directing Filing of Opinion and Filing and Recording of Decree". (R. 1995.) Court held no session—no signed document was furnished to sustain such entry. There was no transaction to enter.
2. The Healy Opinion was not in due form. The clerk violated his duty to appellants in filing it.
3. Filing of "Decree". Clerk took a printed form, filled in the blanks with typewriter, and filed it without signature.
4. Entry of "Decree" in Minute Book. (R. 2004.) The same document was then recopied after filing.

[4a]Appeal was argued and submitted to Circuit Judges Mathews, Stephens and Healy February 15, 1944. (R. 1994.)

application to the senior judge for action under Rule 4 of the Circuit Court. (R. 2014, 2015.) It was ignored. *The docket fails to show whether it was presented, or withheld, or considered, or denied.*[4b]

Denial of Petition for Rehearing.

We petitioned for a rehearing *in bank*. We asked for consideration of that petition *in bank*. It does not appear to have been examined by any judge not originally assigned to our case. Circuit Judges Mathews, Stephens and Healy sat to deny rehearing.[5]

We now present the questions which the Circuit Court refused to decide.

Point No. 1.

Denial of a Hearing in the District Court.

We start with a flagrant violation of the Bill of Rights—the entry of a judgment without trial. The facts do not admit of dispute:

[4b]CCA Rule 4 reads,—

"Assigning of Causes for Hearing.

(1) The calendars of the court shall be made up by the clerk *under the direction of the senior circuit judge subject to the approval of the majority of the judges.*

(2) The senior circuit judge *after conference* with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; *such designation or assignment may be modified or set aside by a majority of the judges.*"

[5]We request this Court to read the Petition for Rehearing at R. 2017. This document discloses deliberate failure to decide the questions presented on appeal. In spite of the miscarriage of justice disclosed therein, it was impossible to obtain action from any judge who did not sit in the first instance. Order denying rehearing is at R. 2061.

On March 19, 1942 the bank petitioned for approval of a settlement. (R. 314.) An order to show cause issued. (R. 329.) Petitioners objected. (R. 333, 340.) These pleadings raised factual issues requiring a hearing.

On March 31, 1942 the bank presented its case on the petition. (R. 1845.) We moved for a nonsuit. (R. 1883.) The Court suggested that counsel submit the entire matter. A discussion followed. Then the Court acted *on its own initiative. It continued the petition until April 21, 1942, for a "further hearing".*[6]

By this order, the petition was *put on the calendar.* Thereafter it was *kept on the calendar.* The Court made five subsequent orders. Each postponed the date set for *further hearing.*[7] The last one provided for a trial on August 18, 1942.

Discovery was conducted to prepare for that hearing. The bank was required to photostat ledger cards. (R. 393.) Petitioners employed an auditor. His report showed a loss

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[6]March 31, 1942 Minute Order at R. 392; same facts are shown by clerk's worksheet (R. 1937), and by closing entry in reporter's transcript. (R. 1890.)

[7]April 13, 1942. "Ordered . . . further hearing on the motion to terminate proceedings, be continued from April 21, 1942, to May 5, 1942." (R. 398-399.)

May 1, 1942. "Ordered . . . further hearing on the motion to terminate proceedings, be continued from May 5, 1942 to May 19, 1942." (R. 399.)

May 13, 1942. "Ordered . . . further hearing on the petition to terminate . . . continued from May 19, 1942, to June 19, 1942." (R. 402.)

June 13, 1942. "Ordered that all matters now on the calendar . . . are continued to July 1, 1942." (R. 429.)

June 22, 1942. "Ordered that all matters in this case now on the Calendar of this Court for July 1, 1942, be continued to August 18, 1942." (R. 438.)

of $4,029,449.52. (R. 404, 406.) This data was assembled in April and May, 1942.

Depositions were taken at Portland, Los Angeles and San Francisco. These resulted in the discovery of material documents, and the development of proof to establish primary liability.[8] Counsel traveled 2500 miles to attend these hearings.

Amended objections were filed May 20, 1942. (R. 403.) In serving the bank, petitioners included a letter of transmittal to confirm the state of the record. We quote therefrom:

> ". . . according to the minute order entered Mar. 31, 1942, there is now pending a motion by plaintiff for a nonsuit with respect to petition of the bank for termination of the litigation. *In case there should be an order denying this motion for nonsuit, plaintiff is entitled to introduce evidence in support of his objections.*" (R. 1941.)

By the end of June, 1942, depositions were ready. The audit was complete. Petitioners were prepared for trial. *Their objections had been carried on the calendar for three months.*

The District Court then reversed itself without notice. It had acted *on its own motion* in continuing objections for a hearing. *It now acted ex parte and overruled them without trial.* (R. 438.) Judgment was entered in petitioners' absence. (R. 458.)

The bank took this opportunity to suppress the suit. Although joined as a defendant, it sought to act as plaintiff

[8] R. 797, 845, 866, 871, 879.

for the purpose of filing a "Dismissal". (R. 461.) The Court made an ex parte order to ratify such action.

Immediate steps were taken to vacate these proceedings. Petitioners filed Demand for Trial (R. 464), Motion to Vacate (R. 468), Supporting Affidavit (R. 471) and Offers of Proof (R. 481). These applications were denied from the bench. (R. 736.) Petitioners were told to take their case to the Circuit Court of Appeals.

Questions presented.

There were two distinct infringements of fundamental rights, viz.:

1. Refusal to grant the trial secured to petitioners by minute entries made in the District Court.

2. Right to vacate the decree under Rule 60(b) FRCP on the ground of mistake.

Neither question was decided in the Circuit Court.

Point No. 2.

Violation of Supreme Court Decisions Requiring Findings.

We have a judgment unsupported by findings. There is nothing except a general recital in the decree. *The issues raised by objections are not even covered by a recital.* There has been a total failure to comply with Rule 52(a) FRCP.

The Circuit and District Courts have each violated the following decisions of this Court, viz.:

Kelley v. Everglades District, 319 US 415 at 420;

Securities and Exchange Commission v. Chenery Corp., 318 US 80 at 94;

Consolidated Rock Products Co. v. DuBois, 312 US 510 at 525;

Mayo v. Canning Co., 309 US 310 at 316;

Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 US 103 at 110;

Interstate Circuit Inc. v. United States, 304 US 55 at 56.

Questions presented.

1. Duty of inferior Federal Courts to follow and apply the law as laid down by decisions of the Supreme Court of the United States.

2. Right of a litigant affected by a violation of that duty to obtain relief and compliance on certiorari.

Point No. 3.

Standards Governing a Proceeding Under Rule 23(c) FRCP.

In receivership and Chandler Act cases, this Court has held that settlements with creditors and security holders must be based upon "an informed and independent judgment"; that objections must receive "orderly consideration"; and that a District Court must act in such matters on the basis of "detailed and authentic information". We cite:

National Surety Co. v. Coriell, 289 US 426;

Case v. Los Angeles Lumber Products Co., 308 US 106;

Securities and Exchange Commission v. United States Realty & Improvement Co., 310 US 434;

Consolidated Rock Products Co. v. DuBois, 312 US 510;

Kelley v. Everglades District, 319 US 415.

In the Sixth Circuit, a similar rule has been applied to proceedings under Rule 23(c) FRCP, for compromise of shareholders' suits. See *Cohen v. Young*, 127 Fed. (2d) 721.

In the Ninth Circuit, the Court has arrived at a result which is diametrically opposed. It has refused to apply any proper standard of conduct, leaving the dismissal of such suits to the *uncontrolled discretion of a district judge.*

In our case, the Court rejected proof of the damage. An auditor's report showing $4,029,449.52 loss was excluded. (R. 404.) It refused to consider the financial responsibility of parties released. (R. 421, 521.) It ignored documentary proof sustaining the liability. *It even denied petitioners an opportunity to read depositions into the record.* (R. 573.)

The Circuit Court refused to consider what standards should have been applied. We cited *Cohen v. Young* (R. 2032) and *Case v. Los Angeles Lumber Products Co.* (R. 2043.) These decisions were ignored. It has been impossible to obtain a ruling.

Point No. 4.

Refusal of Right to Recognize Derivative Status.

The bank had no right to dismiss. It should not have been allowed to petition. The Court had no power to make an ex parte order ratifying a dismissal. These questions all depend on the same essential fact, viz.: *derivative right of stockholders to maintain suit.*

A stockholder with status to sue has, as a corollary, the right to manage and control the litigation. He has the right to prevent a dismissal.

The corporation, *as a defendant*, has rights similar to any other party so joined. It has the right to obtain a dismissal on payment or satisfaction of the claim. It may, therefore, submit an offer on terms "fair and equitable" to stockholders. Such a settlement is equivalent to a satisfaction. It has no right to dismiss on any other basis.

The District Court committed palpable error in treating petitioners as "guardians ad litem". It should not have allowed the bank to supplant them by filing a petition. Derivative status was controlled by the decisions of this Court in:

Delaware & Hudson Co. v. Albany & Susquehanna RR Co., 213 US 435;[8a]

Doctor v. Harrington, 196 US 579.[8b]

Hostile conduct of the management is there held to create a derivative right. It is also held that a corporation joined in a stockholders' suit must be aligned in accordance with the facts—where shown to be opposed to the interests of its stockholders—it must be treated as a defendant.

[8a]In *Delaware & Hudson* case, Justice McKenna held that an adverse interest within the corporation, resulting in a denial of liability, would create status. "... it was natural enough that a stockholder should seek more earnest representatives . . . Emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or, it is more accurate to say, do not apply." (213 US 447, 451.)

[8b]In *Harrington* case, Justice McKenna held that "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. . . . If a controversy hence arise . . . it can be litigated in a federal court". (196 US 587.) Here, the corporation was aligned as defendant and diversity of citizenship was thus established to support the jurisdiction.

Derivative Facts Shown by the Record.

Rule 23(b) FRCP was satisfied by a demand before suit, followed by an unsuccessful application at a stockholders' meeting. (R. 47, 1494.)

The Reconstruction Finance Corporation acquired the majority stock about two months later.[9] We applied to that agency. Its Chairman, Emil Schram, refused to interfere.[10]

The bank was caught in a conspiracy with its directors. *It was found prosecuting appeal from a judgment in its own favor.* That judgment was entered in another stockholders' suit—being for recovery of secret profits obtained by former president Herbert Fleishhacker.[10a]

These facts were communicated to Chairman Schram. Petitioners were again unable to secure relief. They were not even successful in obtaining an explanation.[11]

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[9]Purchased $20,000,000 of preferred stock under 12 USCA 51(d), for a recapitalization completed Dec. 27, 1938. (R. 1000.) These funds were used to retire a prior issue of preferred stock ($5,000,000 par value sold June 1933), to absorb writeoffs aggregating $12,943,744.71 (R. 1280) and provide working capital. Substandard assets (including such writeoffs) amounted to $23,353,610.79 at date of the Dec. 1938 recapitalization. (R. 1283.)

[10]Counsel for petitioner Denicke received letter from Schram, Chairman of RFC, Oct. 19, 1939, stating that it was RFC policy to "refrain from interfering with the detail operation of a bank whose preferred stock it owns". (R. 582.)

[10a]This violation of duty was exposed in the Circuit Court. Herbert Fleishhacker went on with his appeal seeking certiorari. Transcript in that matter is of record as No. 181 Oct. Term, 1940. This record shows that the bank took a positive stand in lower Court as appellant, assigning errors in its own behalf to obtain reversal. (Blum, R. 775.) Case docketed in this Court as *Fleishhacker v. Blum.*

[11]Letter Sargent to Schram, Mar. 8/40, shows misuse of bank name to reverse decree against Herbert Fleishhacker, former president—activities of management in that behalf—use of corporate power to protect directors—impossibility of obtaining appointment of independent committee to inquire into facts. (R.

Rule 23(b) FRCP allows a plaintiff to show "reasons for not making (an) effort" to obtain relief within the corporation. We complied with this part of the rule.

Facts Taking Case Out of Rule.

The bank moved to dismiss, alleging want of jurisdiction. (R. 926, item 5.) It stood by while executive committee members (represented by its present counsel) sought dismissal on the merits.[12] It suppressed documents proving directors' liability. It pretended that shareholders were not entitled to that information. (R. 1558.) It filed false answers to interrogatories. It concealed $3,900,000 in loans involving directors.[13] It refused to employ independent

1588.) See also letter Sargent to Schram, Mar. 20/40, showing refusal of bank counsel to explain conduct on this appeal (R. 1613); also letter Doble to Thomson, Mar. 13/40 (Pres. of bank elected by RFC), requesting disclosure of expense incurred to overthrow such decree (R. 1205), and Thomson's denial of receipt of such letter. (R. 1199.)

[12]Chickering & Gregory (now counsel for bank) filed motions in March 1939, seeking dismissal on behalf of executive committee members Wayman, Kahn and Reis. (R. 51, 60.)

[13]See interrogatories to bank (R. 84) and answers. (R. 191.) Analysis thereof shows concealment of the following accounts involving directors:

Robert Dollar Co. (R.S. Dollar) R. 1364	$1,659,900.00
Sitka Spruce Co. (H. Fleishhacker, R.S. Dollar) R. 1364	356,695.95
Western Publishing Co. (H. Fleishhacker, Shoup, Humphrey) R. 1364	125,000.00
Wilmac Inc. (Humphrey, H. Fleishhacker) R. 628	601,271.54
T. S. Cattle Co. (Humphrey) R. 628	185,890.08
Planatol Co. (H. Fleishhacker, Humphrey, Tyson) R. 628	132,000.00
Kingsbury R. 1307	263,000.00
Shoup R. 1310	26,000.00
Pahrump Valley Co. (H. Fleishhacker, Shoup) R. 1367	76,654.68
Spring Canyon Coal Co. (H. Fleishhacker, Shoup) R. 1367	284,654.93
Lindgren & Swinerton Co. R. 1369	190,000.00
Total amount concealed	$3,901,067.18

counsel. In May, 1941, petitioners offered to cooperate with any group able to furnish independent representation for the common stock. (R. 1651.)

The body of the corporation has been used as a Trojan Horse to shield directors. It has acted as plaintiff to seek dismissal, as a defendant to oppose discovery, and as a "neutral" when petitioners sought to investigate its conduct. It has never been represented by counsel not identified with the defense of its directorate.

For five years, funds which should be held in trust for stockholders, have been squandered to support collusive efforts to suppress suit. The corporation has been spending money to prevent its shareholders from collecting damages which belong to them. A so-called "new management" installed after suit, has been party to this course of action.

Questions presented.

1. Nature and extent of petitioners' right to manage and control the litigation.

2. Limitation on the right of the bank to petition for dismissal.

3. Petitioners' right to nonsuit the petition.

The Circuit Court failed to decide these questions. It refused to cite the *Delaware & Hudson* and *Harrington* cases. The issue was avoided by a reference to *Hawes v. Oakland,* 104 US 450, involving a set of facts not remotely in point.

Point No. 5.

Disregard of Local Law Defining Stockholders' Rights in Corporate Property.

The District Court treated petitioners as having no greater standing than guardians ad litem. It relied on dictum from an early California case.[14] On appeal, we cited:

Klopstock v. Superior Court, 17 Cal. (2d) 13, 108 Pac. (2d) 906 (decided Jan. 10, 1941);

Eggers v. National Radio Co., 208 Cal. 308, 281 Pac. 58 (decided Sept. 30, 1929).

In the *Klopstock* case. it was held that the ultimate interest of a shareholder was sufficient to sustain suit—that his derivative right passed to his executor in case of death, with an ultimate right in favor of his heirs.

The *Eggers* case recognizes the status of minority stock whenever a corporate management fails to press claims in good faith. California decisions accord with the overwhelming weight of authority.

The Circuit Court ignored these decisions. It erroneously applied the rule in *Erie RR Co. v. Tompkins,* 304 US 64, assuming that the bank's right to obtain realignment would be governed by local law. Procedure and not substance was involved in this latter question. It was clear

[14] *Whitten v. Dabney,* 171 Cal. 621, suggesting that a stockholder suing for a corporation is a guardian ad litem who invokes legal process for the purpose of starting a suit. The California Court used that analogy, solely as dictum, to demonstrate that the liability in a derivative suit would be barred when the corporation had lost its right to sue—also to show that an individual shareholder had no power to discharge a corporate claim without Court approval.

under local law that petitioners had property rights sufficient to support relief in equity.

Point No. 6.

Cross-Examination of Bank Officers.

Petitioners sought to cross-examine the President, William H. Thomson; First Vice-President Calkins, and Vice-President Hoover. These parties handled the settlement negotiations. Their testimony would have disclosed concealment of the loss,—suppression of documents,—and conspiracy to enable directors to avoid liability.

Point No. 7.

Depositions of Schram and Husbands.

Cross-examination of the witness Emil Schram (former Chairman of RFC) involved a letter sent to petitioners in October 1939, disclosing refusal to interfere with management policy.

The testimony of Sam H. Husbands (director of RFC and of Anglo Bank) concerned his participation in the settlement negotiations.

Process was sought against both witnesses under Rule 26 FRCP. (R. 580.)

Point No. 8.

Depositions Under Rule 31 FRCP.

Interrogatories were propounded to officers connected with various federal agencies:

1. To establish the flagrant character of the liability.

2. To show that the bank's representatives had knowledge of the guilt of the parties to be released.

3. To compare failure in law enforcement before suit —with a failure to enforce liability after suit.

The following persons were named:

J. F. T. O'Connor (former Comptroller of the Currency) concerning law enforcement before suit.

Marriner S. Eccles (Chairman of Federal Reserve) concerning failure of that agency to prevent mismanagement (R. 680);

Leo T. Crowley (Chairman of Federal Deposit Insurance Corporation)—to obtain the same facts regarding action of FDIC as insurer of deposits of respondent bank (R. 684);

William F. Folger (Chief National Bank Examiner) to locate documents to complete case of directors' liability, and to explain relation of other agencies to mismanagement existing between 1933 and 1938. (R. 693.)

Jesse Jones (Chairman of RFC) concerning failure to exercise power of control over Anglo Bank management acquired in 1933.

Bank officers and RFC officials were unquestionably subject to process—the former on the ground that the corporation was joined as defendant—the latter, because RFC is an agency created with power to sue and be sued. No statutory privilege existed in favor of the other witnesses.

Refusal to allow this testimony affected the validity of the judgment. The Circuit Court refused to pass on that question.

Important Question—Status of Reconstruction Finance Corporation.

This appeal raises questions of special importance. RFC is majority stockholder. It is a fiduciary under the decision of this Court in *Pepper v. Litton*, 308 US 295 at 306.

It was chartered with the power to sue and be sued. (15 USCA 604.) Its officers and directors—in fact all of its operations, are necessarily subject to legal process. (*RFC v. Menihan Corp.*, 312 US 81; *Keifer & Keifer v. RFC and Regional Agricultural Credit Corp.*, 306 US 381.)

On certiorari it will be the duty of this Court to determine the standards which apply to that set of facts.

There is presently a conflict between the Sixth and Ninth Circuits which should be settled by the granting of a writ. This Court should define the scope of hearing required by Rule 23(c) FRCP.

Point No. 9.

Infringement of Right to Amend and Intervene.

Petitioners lodged a Third Amended Complaint containing the proof developed by discovery between April and June 1942. (R. 537.) Mrs. Doble applied for intervention and leave to appear as co-plaintiff. (R. 466, 532.) She had previously acted as an objecting stockholder, Mr. Denicke being the original plaintiff.

Both motions were denied. The constitutional right to a trial includes the right to plead a case on the merits.

Duty to Render Adequate Opinion.

This appeal involved nine substantial questions. None of them have been decided. The Circuit Court refused to cite or distinguish cases in point. It declined to follow opinions rendered by this Court. It infringed petitioners' right to a decision, *in writing*, covering the issues involved. It violated their right to have a document evidencing such decision, authenticated by the signatures of at least two circuit judges.

SUPPRESSION OF RECORD ON CERTIORARI.

We designated the documents required to show irregularity in the Circuit Court.[15] The judges responded by filing an *ex parte* order to keep such matter out of the transcript. We present that order as:

Petitioners' Exhibit No. 3.

"ORDER RE PREPARATION OF RECORD FOR CERTIORARI PURPOSES

Mr. Aaron M. Sargent, counsel for appellants, having requested the clerk to prepare a record for use upon petition for writ of certiorari, in the above-entitled case, and to issue as a part of the certified record a photostatic copy of the opinion of this court, *it is Ordered that the clerk prepare the record in the usual and customary manner.*

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[15]Photostat of entire Opinion, including irregular signature clause (R. 2070, item 8); also photostat of document evidencing amendment of rules signed by entire Court. (R. 2074, item 8a.)

Dated: San Francisco, California, April 14, 1944.

CLIFTON MATHEWS,
United States Circuit Judge.

FILED
Apr. 14, 1944
Paul P. O'Brien,
Clerk.

ALBERT LEE STEPHENS,
United States Circuit Judge.

WILLIAM HEALY,
United States Circuit Judge."

(R. 2066.)

The Clerk was requested to photostat and certify these records as separate documents. He refused.[16] An incomplete record has been transmitted to this Court. The body of the Opinion was printed. The signature clause was left out.[17] The clerk certified that the documents furnished were true copies of the originals.[18]

We then tested our right by motion. Circuit Judges Mathews, Stephens and Healy sat to deny that motion. No argument was permitted. Judge Mathews made the following statement from the bench:

> "We have here a so-called motion to obtain certified photostatic copies of designated records, in the case of Denicke and Doble against The Anglo California National Bank, No. 10329. We have examined this so-called motion. We find that it is simply a request to the Court that the Court require the clerk to do that

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[16]Praecipe requesting such copies filed with clerk May 10, 1944—copy thereof included in motion to correct transcript.

[17]See R. 2004 showing omission of signature clause in printing of Opinion.

[18]Clerk's certificate to this Court (R. 2078) is obviously false. It states that the documents included are "full, true and correct (copies) . . . as the originals thereof remain on file".

which we have told him not to do. We wont entertain this motion. The motion is denied."

We demanded a hearing.

"Mr. Sargent. I ask for my constitutional right to argue the motion.

Judge Mathews. Motion denied. Court will be adjourned.

Mr. Sargent. *I renew my request for my constitutional right to argue the motion.*

Judge Mathews. *You have no such right as that. The Court will be adjourned.*"[19]

JURISDICTION.

This Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 USCA 347.)

The Circuit Court had jurisdiction under Section 128 of said code (28 USCA 225); the District Court had original jurisdiction under Section 24 thereof. (28 USCA 41.)

Suit arose under the laws of the United States. It was an action to enforce directors' liability created by the National Bank Act and Federal Reserve Act.[21] Original

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[19]Statement appears in Reporter's Transcript filed in Circuit Court—included in Motion for Enlargement.

[21]Defendant directors were charged with permitting violation of loan limit (12 USCA 84), with assenting to illegal loans to executive officers (12 USCA 375a), and with receipt of bonuses and other considerations in connection with the granting of loans (12 USCA 595). Directors were liable for such violations under 12 USCA, Secs. 93 and 501a, which are respectively part of the National Bank Act and Federal Reserve Act.

jurisdiction is sustained by *Chesbrough v. Woodworth*, 244 US 72.

The Circuit Court entered a "judgment" on March 1, 1944. (R. 2004.) Petition for rehearing was filed within the time required by rule (R. 2017)[22] and was denied April 7, 1944. (R. 2061.)

The time for certiorari did not run until denial of such petition.[23]

Petition for a writ is filed within three months of order denying rehearing.

QUESTIONS PRESENTED.

1. Duty to issue a writ in order to cancel void entries made by the Circuit Court.

2. Duty to grant the writ in order to protect petitioners' right to an appellate review of their case.

3. Right to an adequate opinion or other decision in writing, signed by two or more Circuit Judges, and disclosing the action taken by the Circuit Court with respect to all substantial questions raised on appeal.

4. Right to a writ to obtain reversal and compliance with decisions of this Court requiring findings under Rule 52(a) FRCP.

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[22]CCA Rule 25 allowing filing within 30 days after judgment. Decree was dated March 1, 1944. We filed March 29, 1944. Order denying rehearing showing filing within time permitted. (R. 2061.)

[23]*Citizens Bank v. Opperman*, 249 U.S. 448; *Texas & Pacific Ry. v. Murphy*, 111 U.S. 488; *Chicago & Great Western v. Basham*, 249 U.S. 164; *Aspen Mining & Smelting Co. v. Billings*, 150 U.S. 31; *Voorhees v. Noye Mfg. Co.*, 151 U.S. 135.

5. Duty to issue writ and direct reversal because of judgment entered without trial of objections in the District Court.

6. Duty to issue such writ to direct reversal of judgment under Rule 60(b) FRCP on the ground of mistake.

7. Duty to order reversal because of refusal of District Court to admit evidence under Rule 23(c) FRCP.

8. Duty to direct District Court to grant nonsuit because of derivative status established by petitioners, and lack of capacity in bank to maintain a petition.

9. Duty to recognize local law as declared in *Klopstock v. Superior Court,* 17 Cal. (2d) 13, 108 Pac. (2d) 906; and in *Eggers v. National Radio Co.,* 208 Cal. 308, 281 Pac. 58, confirming property right of petitioners sufficient to support stockholders' suit.

10. Erroneous application of *Erie RR Co. v. Tompkins,* 304 US 64, in holding that procedure for realignment of bank as party plaintiff would depend on state law rather than upon federal rules.

11. Right to cross-examine bank officers handling settlement negotiations.

12. Right to take depositions of officers of RFC who were parties to settlement discussions.

13. Right to propound interrogatories under Rule 31 FRCP to officers of RFC, Federal Reserve and FDIC, regarding transactions before suit.

14. Right to propound such interrogatories to Chief National Bank Examiner to locate documents within the scope of a *subpoena duces tecum.*

15. Right to file amended pleading setting up facts developed by discovery—and right to intervene and appear as co-plaintiff in such pleading.

REASONS FOR GRANTING THE WRIT.

1. To vacate the judgment and set aside the arbitrary and irregular entries made by the Circuit Court herein.

2. To protect petitioners' right to an appellate review.

3. To enforce compliance with decisions of this Court requiring findings under Rule 52(a) FRCP.

4. To secure petitioners' constitutional right to a trial of their objections and to correct the miscarriage of justice which has resulted from a refusal to recognize that right.

5. To lay down adequate standards governing opinion writing and the entry of judgments by Circuit Courts, to the end that the irregularities disclosed in this case may not be repeated.

6. To define adequate procedure governing the right of a litigant to obtain rehearing in bank in a Circuit Court, where necessary to correct palpable error.

7. To lay down proper standards governing approval of settlements under Rule 23(c) RFCP—and to define the meaning of the term "fair and equitable", as applied to such a proceeding.

8. To consider the application of the decision of this Court in *Case v. Los Angeles Lumber Products Co.*, 308 US 106, and other Chandler Act cases—in respect to proceedings for compromise of a shareholder's suit.

9. Conflict between Sixth and Ninth Circuits. In the former, standards similar to those in Chandler Act cases are enforced. See *Cohen v. Young*, 127 Fed. (2d) 721. In the Ninth Circuit, dismissal of a stockholders' suit has been held to rest in the *uncontrolled discretion of a District Judge.*

10. Departure from proper course of judicial proceedings in the Circuit Court—as shown by entry of a void decree, the filing of an Opinion in violation of Rule, refusal to vacate decree, failure to entertain proper motion for that purpose, refusal to consider application for reassignment, refusal to grant rehearing in bank, suppression of material facts from transcript, refusal to separately certify material records, and denial of motion for copies of papers within the scope of records required by law to be kept public in said Court.

11. Complete disregard of duty in sanctioning arbitrary conduct of District Court in entering judgment without trial or findings.

Special Questions of Public Importance.

12. *Derivative status.* This case involves a modern application of the principles announced in *Delaware & Hudson Co. v. Albany & Susquehanna RR. Co.*, 213 US 435, and in *Doctor v. Harrington*, 196 US 579. The widespread use of proxy voting, the dispersion of shareholders, and the shifting of power in favor of corporate managements has made this problem of unusual importance. This Court should analyze and restate the law applicable to that set of facts.

13. *RFC Status.* The Reconstruction Finance Corporation is majority stockholder. Its rights and obligations

should be defined. This Court should apply the rule in *Pepper v. Litton*, 308 US 295, 306 to that situation.

14. *Failure of jurisdiction on appeal.* The Circuit Court has arbitrarily declined to exercise the powers granted to it by Congress. The result has been a miscarriage of justice. This condition establishes a right of review on certiorari. Petitioners rely on the Opinion of Chief Justice Marshall in *Cohens v. Virginia*, 19 US (6 Wheat.), 264 at 403.

> "The judiciary cannot, as the legislature may, avoid a measure. . . . We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

15. *Right of subpoena.* In refusing to permit cross-examination of the persons involved in settlement negotiations, the District Court raised questions of tremendous importance. Petitioners sought the testimony of bank officers and federal officials.

This process was claimed to rebut adverse presumptions indulged without a trial. The Constitutional right to a subpoena was invaded.

The remedy of a Congressional subpoena has recently been the subject of public interest. That process furnishes the method for discovering truth in legislative matters.

Individual rights are secured by a similar process—the judicial subpoena. This includes the *subpoena duces tecum*. That right is basic. Without it, impartial administration of justice is impossible.

We have created Courts where all men can be heard. Due process of law has been guaranteed. We have provided for equal justice under law. The humblest man in our nation is guaranteed these rights as against the most powerful interest.

For one hundred and thirty-seven years this process has been kept inviolate. It was recognized by Chief Justice Marshall in June, 1807, on the trial of Aaron Burr,

> "It is a principle of the English Constitution that the King can do no wrong; that no blame can be imputed to him, that he cannot be named in debate.
>
> By the Constitution of the United States, the President as well as every other officer of the government may be impeached and may be removed from office on high crimes and misdemeanors.
>
> * * * the President is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again.
>
> Whether essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the chief executive, will be perceived by every person * * *
>
> If, then, as is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it, of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it * * *
>
> *The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process* * * *

It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential for his defense, which may for aught that now appears be essential, had been withheld from him. I will not say that this circumstance would in any degree tarnish the reputation of the government; but I will say that it would justly tarnish the reputation of the court which had given its sanction to its being withheld."

Under Section 240 of the Judicial Code, we apply for issuance of a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for writ of certiorari is well founded, and that the same is not interposed for purposes of delay.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT.